

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 170 of 1992

For Approval and Signature:

Hon'ble MR.JUSTICE R.K.ABICHANDANI and
MR.JUSTICE K.R.VYAS

=====

1. Whether Reporters of Local Papers may be allowed : YES
to see the judgements?
2. To be referred to the Reporter or not? : NO
3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge? : NO

STATE OF GUJARAT

Versus

CHIMANBHAI M SONARI

Appearance:

MR. K.P.RAVAL, ADDL. PUBLIC PROSECUTOR for Petitioner
MR. R.R. TRIPATI, Advocate for
MR AR SHAIKH for Respondent No. 1

CORAM : MR.JUSTICE R.K.ABICHANDANI and
MR.JUSTICE K.R.VYAS

Date of decision: 22/06/1999

ORAL JUDGEMENT (Per R.K.Abichandani,J.)

The State has appealed against the acquittal of
the respondents, by the Additional Sessions Judge,
Ahmedabad (Rural), Mirzapur, by his judgement and order
dated 27.11.1991, passed in Sessions Case No. 134 of

1988, for the offences under Sections 147, 148, 149, 504 and 302 of the Indian Penal Code.

2. The prosecution version was that there was some altercation between the deceased Dahyabhai Revabhai and the respondent No.1 Chimanbhai Mithabhai Sonari, on 1st May, 1988 in the afternoon and as a result thereof, these respondents constituted an unlawful assembly and at 1.00 A.M on 2.5.1988, come to village Bhuteshwari with an intention to murder Dahyabhai and in order to achieve that object, the respondent No.1 - Chimanbhai Mithabhai poured kerosene on Dahyabhai, the deceased, while he was sleeping on the cot and the respondent No.2 - Manilal Kanjibhai lighted a match-stick and set him on fire. All the other respondent accused persons who were present were giving abuses. Dahyabhai ultimately died on 12.5.1988 due to the burns received by him.

3. There is no eye-witness to the incident. The prosecution mainly relied upon the evidence of Govindbhai P.W 4, who has deposed at Ex.28; Motibhai Ramabhai P.W 5, who has deposed at Ex. 125; Dr. Sailesh Raval, P.W.1, who has deposed at Ex.22 and the dying declarations made by Dahyabhai before the Executive Magistrate at Ex.35 and in form of the complaint given by him before the police, which is at Ex.38. The trial Court, after considering the evidence on record, came to a finding that the prosecution has not established the guilt of any of these accused persons beyond any reasonable doubt, and acquitted the respondents.

4. The learned Additional Public Prosecutor took us through the entire evidence on record and contended that it was established from the dying declarations of Dahyabhai and the oral testimony of Dr. Sailesh Raval, who had stated the history given to him by Dahyabhai and the prosecution witness No.4 Govindbhai, elder brother of Dahyabhai, that all these accused persons have committed the offences which were levelled against them.

5. The learned Counsel appearing for the respondents, on the other hand, contended that there were inconsistencies in the dying declarations and there was no reliable evidence to establish the guilt of the accused persons beyond reasonable doubt. He placed reliance on the decision of the Supreme Court in Kamla Vs. State of Punjab, reported in AIR 1993 S.C 374, in which it was held that a dying declaration should satisfy all the necessary tests and one such important test was that if there are more than one dying declaration, they should be consistent, particularly in material

particulars.

6. The incident occurred around 1'0 Clock during the night between 1st May, 1988 and 2nd May, 1988. It is established that Dahyabhai died due to burns, which he had received in that incident. The defence version is of total denial and a defence witness is examined to contend that Dahyabhai may have committed suicide because of the sister of the respondent No.1 - Kamuben having gone away from village Bhuteshwari to stay with her in-laws after a cosy relationship with Dahyabhai for a couple of years when she was estranged with her husband and had come to stay with her parents at Bhuteshwari. The effort was to indicate that possibility of suicide by Dahyabhai cannot be ruled out.

7. Govindbhai Revabhai, elder brother of the deceased, in his deposition at Ex.28, has stated that the respondents are related to him. According to him, during the night of the incident between 1.00A.M and 2.00 A.M, Babuben - accused No.4 and Manilal - accused No.2 had come to his house and informed him that his brother had received burns. He therefore, went to the place of the incident and saw that Motibhai Ramabhai and Somabhai Kalabhai were looking after his brother. He had seen that his brother had received burns on his chest and both hands till the wrists, and that he was writhing with pain. He had then gone to fetch a tractor for taking him to the hospital. He had stated that he had walked down to Ahmedabad and gone to his sister and brother and told them that Dahya had received burns and that they should come to Bhuteshwari. He came back to Bhuteshwari, reaching there around 9'0 Clock in the morning. He then went to village Behiyar and rented a metador van and took Dahya to Dehgam Civil Hospital from Bhuteshwari. According to him, he told the doctor that his brother had received burns and that he should examine him and as the doctor came out and asked Dahya as to what had happened, Dahya told the doctor that Chimanbhai Mithabhai and Babuben Mithabhai - these persons had poured kerosene on him and set him on fire. The doctor told them that he could not be treated there and that he should be taken to Civil Hospital, Ahmedabad and thereafter, he was taken to Civil Hospital at Ahmedabad, where he died on 12th May, 1988. In his cross-examination, he has admitted that he does not know as to how Dahyabhai had received burns. He has stated that the respondent No. 5 - Jasodaben is wife of respondent No.1. He has stated that Dahya was a widower since about 2-3 years prior to the incident and was staying alone in his house at Bhuteshwari. Opposite his house were staying the respondent No.4 Babiben with

Kamla, Hitendra, Sharda and Kanta. He has stated that on 1st May, 1988 Kamla, who was also known as "Kamu" was taken from Bhuteshwari by her relatives including in-laws, to Ahmedabad. According to him, the respondent No.1 Chimانبhai and others had taken Kamla to Ahmedabad in the evening at about 5'0 Clock on 1.5.1988. This witness has no knowledge as to how the incident had occurred. His evidence is mainly relied upon to show that in his presence the doctor had asked Dahyabhai as to what had happened and Dahyabhai told the doctor that Chimانبhai Mithabhai and Babiben Mithabhai - those persons had poured kerosene on him and burnt him. This witness does not state anything about the immediate version of Dahyabhai to him. His story that he walked down to Ahmedabad during the night and came back to Bhuteshwari by 9'0 Clock in the morning, can hardly be accepted because Ahmedabad is about 45 K.M away from Bhuteshwari, as per the deposition of P.I Natverlal Ex.37. He could not have walked a total distance of more than 90 K.M after 2'0 Clock during the night between 1.5.1988 and 2.5.1988 and reached back to Bhuteshwari in the morning at 9'0 Clock. In his cross-examination, he has stated that he cannot say as to whether Dahya had spoken truth before the doctor at Dehgam.

Dr. Sailesh Raval in his deposition at Ex.22 has stated that when he had asked Dahyabhai, he had stated that Chimانبhai and his family members had poured kerosene on him and set him on fire. In his cross-examination, he has admitted that he had not made any note of this talk. It is difficult to accept that after a lapse of nearly three years, this doctor should remember as to what Dahyabhai told him, especially when he immediately sent them away to Ahmedabad on the ground that there was no facility for treating such patients at Dehgam. The case paper which he has produced at Ex.23 does not indicate the fact that Dahyabhai or anyone else had given the history of the incident. Furthermore, Govindbhai had gone to the house of his brother and sister at Ahmedabad at the earliest point of time and if the respondents had poured kerosene and set him on fire, Dahyabhai would have immediately disclosed that fact to Govindbhai and Govindbhai would not have waited till the doctor asked Dahyabhai at Dehgam hospital and where Dahyabhai is said to have disclosed the names of Chimانبhai and Babiben. In fact, the doctor does not refer to the name of Babiben at all. The evidence of Govindbhai does not carry the prosecution case any further.

Motibhai Ramabhai, in his deposition at Ex.29, in

fact states that doctor had not asked anything from Dahyabhai and Dahyabhai had not spoken anything. This witness is said to have gone to Dahyabhai after hearing his shouts at the time of the incident. According to him, Somabhai was also present. He has stated that they had asked Dahyabhai as to what had happened, but Dahyabhai did not give any reply. They removed his clothes and covered him with a sheet. Thereafter, this witness had gone to sleep. In his cross-examination, he too has stated that on 1st May, 1988 around 5'0 Clock Kamla had gone to Ahmedabad with her in-laws, Chimanbhai Mithabhai i.e. respondent No.1 and Jasodaben i.e. respondent No.5 and Sureshkumar Trikamlal - respondent No.3, who all had come to fetch her. This witness does not throw any light on the incident.

Witness Somabhai P.W 6 has turned hostile to the prosecution and in his deposition, he has stated that Dahyabhai had poured kerosene on himself and set himself on fire and when this witness asked Dahyabhai about it, Dahyabhai told him that he was in love with Kamla and since Kamla had gone away on that day, he was committing suicide. This version is totally different from what he narrated before the police, as it appears from the contradictions which are brought on record. This witness is therefore, not a reliable witness. He has reiterated in his cross-examination that Kamla was taken away by her in-laws and the respondent No.1 and other respondents named by him, to Ahmedabad at around 5'0 Clock and therefore, frustrated Dahyabhai committed suicide.

Thus, the oral evidence hardly supports the prosecution version as regards the involvement of the accused - respondents in the commission of the offences levelled against them.

Much reliance was placed on the dying declaration Ex.35, which was recorded by M.M.Parmar, Executive Magistrate, who has deposed at Ex.33. According to him, he had verified that Dahyabhai was in his full senses and that the doctor had also so certified and therefore, he recorded the dying declaration in great details. In the dying declaration Ex.35, Dahyabhai is said to have told him that the incident had happened around 1'0 Clock outside his house while he was sleeping alone and at that time he was wearing polyester bush-shirt and pants. He had stated that while he was sleeping on a cot, the respondent No.1 Chimanbhai Mithabhai, the respondent No.2 Manilal Kanjibhai, the respondent No.3 Sureshkumar, who is son of the maternal uncle of respondent No.1, the mother of respondent No.1 Babiben and sisters of

respondent No.1 Kamuben, Manjuben, Punjiben and his wife had come and at that time Chimanbhai poured kerosene on him from a big bottle, which he had brought and Manilal Kanjibhai lighted a match-stick and set him on fire and as he caught fire, he started running, and that Chimanbhai and all others of his family abused him while he was burning. Hearing the shouts, Motibhai Ramabhai and Somabhai Kalabhai extinguished the fire by covering him with a quilt. He had stated that on the earlier day in the afternoon when he was digging in the field, Chimanbhai and his relatives had come and beaten him. On being asked by the executive Magistrate as to why was he burnt, Dahyabhai is said to have replied in the said dying declaration that he had worked as a daily wager in Chimanbhai's field and since he had asked for his wages a couple of times, there was a quarrel. Furthermore, Chimanbhai's sisters, who were his cousin sisters, were not behaving virtuously and therefore, he had chided them two days prior to the incident. This is why these respondents had kept vengeance and burnt him.

8. It will be noted from this dying declaration that there was no reference made by Dahyabhai to the fact about Kamlaben having been taken away to her in-laws on 1st May, 1988 and the motive alleged was only of a quarrel over the recovery of the dues of Dahyabhai and his objecting to the improper behaviour of his cousin sisters. The dying declaration which is at Ex.38, does not refer to all the names which were given in the dying declaration Ex.35. There were as many as eight names given by Dahyabhai in that dying declaration, while in the dying declaration Ex.38, which is recorded by the police, he named only the respondent No.1 and the respondent No.2 as the persons who had sprinkled kerosene and set him on fire, while without naming other relatives, he just said that persons who had accompanied these two had given him abuses. There is no mention of Kamlaben having participated in that assault. On the contrary, in this dying declaration he stated that the incident had occurred because Kamla was not returning to her inlaws since about two years and these persons were blaming him for that. In this dying declaration, he had also stated that on 1.5.1988 when the in-laws of Kamla came to take her, he had asked the respondent No.1 Chimanbhai as to why was he sending her with her inlaws and thereupon Chimanbhai had got angry over him. It was stated by him that at 5'0 Clock in the evening, they had taken away Kamla and at night Chimanbhai had poured kerosene and Manilal had lighted a match-stick and set him on fire. It will be noted that the motive attributed

to the respondents by Dahyabhai in this later dying declaration Ex.38 is entirely different from the motive which was attributed to them in the earlier dying declaration. While in the earlier dying declaration, detailed names of all who are said to have joined in the incident were given, in the later dying declaration only two names were given. It has come in evidence that Chimanbhai had gone to Ahmedabad alongwith others when they took Kamla from village Bhuteshwari in the evening on 1st May, 1988. There is absolutely no evidence to indicate that the respondent No.1 Chimanbhai or any of these respondents, who had gone to Ahmedabad had come back to village Bhuteshwari.

9. It will thus, be seen that there is no sufficient oral evidence to implicate any of these respondents and the dying declarations on which much reliance is placed, are inconsistent on material particulars and therefore, inspire no confidence, keeping in view the ratio of the decision of the Supreme Court in Kamla Vs. State of Punjab (supra). We are therefore, of the view that there is no reliable evidence on record to implicate the accused persons and we are in complete agreement with the reasoning and finding given by the trial Court, for acquitting these respondents. The appeal is therefore, dismissed. Bail bonds of all these respondents stand cancelled.

*/Mohandas